



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2012–0070; FWS–R1–ES–2013–0028]

[4500030113]

RIN 1018–AY09; 1018–AZ38

Endangered and Threatened Wildlife and Plants; Listing 15 Species on Hawaii Island as Endangered and Designating Critical Habitat for 3 Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on our October 17, 2012, proposal to list 15 species as endangered and designate critical habitat for 1 of these 15 species on the Hawaiian island of Hawaii, and to designate critical habitat for 2 plant species that are already listed as endangered,

under the Endangered Species Act of 1973, as amended (Act). Critical habitat is not determinable for the remaining 14 species that we proposed to list in our October 17, 2012, proposed rule. We also announce the availability of a draft economic analysis (DEA) of the proposed designation and an amended required determinations section of the proposed designation. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule, the associated DEA, and the amended required determinations section. In addition, we provide supplemental information on one of the species proposed for listing and seek comments on our proposal to list this species in light of this new information. Comments previously submitted on this rulemaking do not need to be resubmitted, as they will be fully considered in preparation of the final rule. We also announce a public hearing and public information meeting on our proposed rule and associated documents.

DATES: The comment period for the proposed rule published October 17, 2012, at 77 FR 63928, is reopened. *Written Comments:* We will consider comments received or postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION]. Please note comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

Public Information Meeting: We will hold a public information meeting in Kailua-Kona, Hawaii, on Wednesday, May 15, 2013, from 3 p.m. to 5 p.m. (see

ADDRESSES below).

Public Hearing: We will hold a public hearing in Kailua-Kona, Hawaii, on Wednesday, May 15, 2013, from 6 p.m. to 8 p.m. (see **ADDRESSES** below).

ADDRESSES: *Document Availability:* You may obtain copies of the October 17, 2012, proposed rule, this document, and the draft economic analysis at <http://www.regulations.gov> at Docket Number FWS–R1–ES–2012–0070, from the Pacific Islands Fish and Wildlife Office’s website (<http://www.fws.gov/pacificislands/>), or by contacting the Pacific Islands Fish and Wildlife Office directly (see **FOR FURTHER INFORMATION CONTACT**).

Written Comments: You may submit written comments by one of the following methods, or at the public information meeting or public hearing:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. Submit comments on the listing proposal to Docket No. FWS–R1–ES–2012–0070, and submit comments on the critical habitat proposal, revisions, and associated draft economic analysis to Docket No. FWS–R1–ES–2013–0028. See **SUPPLEMENTARY INFORMATION** for an explanation of the two dockets.

(2) *By hard copy:* Submit comments on the listing proposal by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R1–ES–2012–0070;

Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203. Submit comments on the critical habitat proposal and draft economic analysis by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R1–ES–2013–0028; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

Public Information Meeting and Public Hearing: Both the public information meeting and the public hearing will be held in the Council Chambers of the West Hawaii Civic Center located at 74-5044 Ane Keohokalole Highway, Kailua-Kona, Hawaii 96740 (telephone 808–323–4444).

We request that you send comments only by the methods described above. We will post all comments we receive on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

FOR FURTHER INFORMATION CONTACT: Loyal Mehrhoff, Field Supervisor, Pacific Islands Fish and Wildlife Office, 300 Ala Moana Boulevard, Box 50088, Honolulu, HI 96850; by telephone at 808–792–9400; or by facsimile at 808–792–9581. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

We are proposing to list 15 species on the Hawaiian island of Hawaii as endangered: specifically, 2 animals (picture-wing fly (*Drosophila digressa*) and anchialine pool shrimp (*Vetericaris chaceorum*)) and 13 plants (*Bidens hillebrandiana* ssp. *hillebrandiana*, *Bidens micrantha* ssp. *ctenophylla*, *Cyanea marksii*, *Cyanea tritomantha*, *Cyrtandra nanawaleensis*, *Cyrtandra wagneri*, *Phyllostegia floribunda*, *Pittosporum hawaiiense*, *Platydesma remyi*, *Pritchardia lanigera*, *Schiedea diffusa* ssp. *macraei*, *Schiedea hawaiiensis*, and *Stenogyne cranwelliae*). We are proposing to designate critical habitat for 1 of these 15 proposed species (*Bidens micrantha* ssp. *ctenophylla*), and for 2 plant species that are already listed as endangered (*Isodendron pyrifolium* and *Caesalpinia kavaense* (taxonomic revision proposed, to *Mezoneuron kavaense*)).

Public Comments

We will accept written comments and information during this reopened comment period on our proposed listing determination and proposed critical habitat designation that was published in the **Federal Register** on October 17, 2012 (77 FR 63928), our draft economic analysis of the proposed critical habitat designation, and the amended required determinations provided in this document.

On October 17, 2012, we published a proposal (77 FR 63928) to list 15 species on the island of Hawaii in the Hawaiian Islands as endangered, and designate critical habitat for 1 of those species and for 2 plant species that are already listed as endangered. Later this year, we will publish two separate final rules: One concerning the listing determinations described above, and the other concerning the critical habitat determinations described above. The final listing rule will publish under the existing Docket No. FWS–R1–ES–2012–0070, and the final critical habitat designation will publish under Docket No. FWS–R1–ES–2013–0028.

We request that you provide comments specifically on our listing determination under Docket No. FWS–R1–ES–2012–0070. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) Biological, commercial trade, or other relevant data concerning threats (or the lack thereof) to the 15 species proposed for listing, and regulations that may be addressing those threats.

(2) Additional information concerning the biology, range, distribution, and population sizes of each of the 15 species proposed for listing, including any comments on the recently confirmed new location for *Vetericaris chaceorum*, the anchialine pool

shrimp proposed for listing as endangered in the October 17, 2012, proposed rule (77 FR 63928) (see discussion below), threats to the species at the new location, and the effect this new location information should have on our analysis of the listing factors for this species, which include:

- The present or threatened destruction, modification, or curtailment of its habitat or range;
- Overutilization for commercial, recreational, scientific, or educational purposes;
- Disease or predation;
- The inadequacy of existing regulatory mechanisms; or
- Other natural or manmade factors affecting its continued existence.

(3) Any information on the biological or ecological requirements of the 15 species proposed for listing, and ongoing conservation measures for the species and their habitat.

(4) Comments on our proposal to revise taxonomic classification with a name change for one plant species identified in the proposed rule.

We request that you provide comments specifically on the critical habitat determination and related draft economic analysis under Docket No. FWS–R1–ES–2013–0028. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(5) The reasons why we should or should not designate areas for *Bidens micrantha* ssp. *ctenophylla*, *Isodendrion pyrifolium*, and *Mezoneuron kawaiense* as “critical habitat” under section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), including whether there are threats to these species from human activity, the degree of which can be expected to increase due to the designation, and whether the benefit of designation would outweigh threats to these species caused by the designation, such that the designation of critical habitat is prudent.

(6) Specific information on:

- The amount and distribution of critical habitat for the three plant species;
- Areas in the geographic area occupied at the time of listing and that contain the physical or biological features essential for the conservation of the three plant species;
- Whether special management considerations or protections may be required for the physical or biological features essential to the conservation of the three plant species; and
- What areas not currently occupied are essential to the conservation of the three plant species and why.

(7) Land use designations and current or planned activities in the areas occupied or unoccupied by the species and proposed as critical habitat, and the possible impacts of these activities on these three species, or of critical habitat on these designations or

activities.

(8) Any foreseeable economic, national security, or other relevant impacts of designating any area as critical habitat. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas that may experience these impacts.

(9) Whether the benefits of excluding any particular area from critical habitat outweigh the benefits of including that area as critical habitat under section 4(b)(2) of the Act, after considering the potential impacts and benefits of the proposed critical habitat designation. We are considering the possible exclusion of non-Federal lands, especially areas in private ownership, and whether the benefits of exclusion may outweigh the benefits of inclusion of those areas. We, therefore, request specific information on:

- The benefits of including any specific areas in the final designation and supporting rationale.
- The benefits of excluding any specific areas from the final designation and supporting rationale.
- Whether any specific exclusions may result in the extinction of the species and why.
- For private lands in particular, we are interested in information regarding the potential benefits of including private lands in critical habitat versus the benefits of excluding such lands from critical habitat. In weighing the potential benefits of exclusion

versus inclusion of private lands, the Service may consider whether existing partnership agreements provide for the management of the species. We may consider, for example, the status of conservation efforts, the effectiveness of any conservation agreements to conserve the species, and the likelihood of the conservation agreement's future implementation.

(10) Our process used for identifying those areas that meet the definition of critical habitat for the species, as described in the section of the October 17, 2012, proposed rule titled *Criteria Used to Identify Critical Habitat Boundaries*.

(11) Information on the extent to which the description of potential economic impacts in the draft economic analysis is complete and accurate.

(12) Whether the draft economic analysis makes appropriate assumptions regarding current practices and any regulatory changes that would likely occur if we designate critical habitat.

(13) Whether the draft economic analysis identifies all Federal, State, and local costs and benefits attributable to the proposed designation of critical habitat, and information on any costs that may have been inadvertently overlooked. For example, are there any costs resulting from critical habitat designation related to the enhancement or maintenance of nonnative ungulates for hunting programs?

(14) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(15) Specific information on ways to improve the clarity of this rule as it pertains to completion of consultations under section 7 of the Act.

Our final determination concerning listing 15 species as endangered and designating critical habitat for 3 plant species on the island of Hawaii will take into consideration all written comments we receive during the public information meeting, written comments and information we receive during both comment periods, from peer reviewers, as well as comments and public testimony we receive during the public hearing. The comments will be included in the public record for this rulemaking, and we will fully consider them in the preparation of our final determinations. On the basis of peer reviewer and public comments, as well as any new information we may receive, we may, during the development of our final determination concerning critical habitat, find that areas within the proposed critical habitat designation do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that areas may or may not be appropriate for exclusion under section 4(b)(2) of the Act.

If you submitted comments or information on the proposed rule (October 17,

2012, 77 FR 63928) during the comment period from October 17, 2012, to December 17, 2012, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determinations.

You may submit your comments and materials concerning the proposed rule or draft economic analysis by one of the methods listed in the **ADDRESSES** section.

Verbal testimony may also be presented during the public hearing (see **DATES** and **ADDRESSES** sections). We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you submit your comment via U.S. mail, you may request at the top of your document that we withhold personal information such as your street address, phone number, or e-mail address from public review; however, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule and draft economic analysis, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS–R1–ES–2012–0070 or Docket No. FWS–R1–ES–2013–0028, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Information Meeting and Public Hearing

We are holding a public information meeting and a public hearing on the date listed in the **DATES** section at the address listed in the **ADDRESSES** section (above). We are holding the public hearing to provide interested parties an opportunity to present verbal testimony (formal, oral comments) or written comments regarding the proposed listing of 15 species as endangered and proposed designation of critical habitat for 3 plant species on the island of Hawaii, and the associated draft economic analysis. A formal public hearing is not, however, an opportunity for dialogue with the Service; it is only a forum for accepting formal verbal testimony. In contrast to the hearing, the public information meeting allows the public the opportunity to interact with Service staff, who will be available to provide information and address questions on the proposed rule and its associated draft economic analysis. We cannot accept verbal testimony at the public information meeting; verbal testimony can only be accepted at the public hearing. Anyone wishing to make an oral statement at the public hearing for the record is encouraged to provide a written copy of their statement to us at the hearing. At the public hearing, formal verbal testimony will be transcribed by a certified court reporter and will be fully considered in the preparation of our final determination. In the event there is a large attendance, the time allotted for oral statements may be limited. Speakers can sign up at the hearing if they desire to make an oral statement. Oral and written statements receive equal consideration. There are no limits on the length of written comments submitted to us.

Persons with disabilities needing reasonable accommodations to participate in the public information meeting or public hearing should contact Loyal Mehrhoff, Field Supervisor, Pacific Islands Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). Reasonable accommodation requests should be received at least 3 business days prior to the public information meeting or public hearing to help ensure availability; at least 2 weeks prior notice is requested for American Sign Language needs.

Background

The topics discussed below are relevant to designation of critical habitat for 3 plant species on the Hawaiian island of Hawaii in this document. For more information on previous Federal actions concerning these species, refer to the proposed listing and designation of critical habitat published in the **Federal Register** on October 17, 2012 (77 FR 63928), which is available online at <http://www.regulations.gov> (at Docket Number FWS–R1–ES–2012–0070) or from the Pacific Islands Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

On October 17, 2012, we published a proposed rule (77 FR 63928) to list 15 species as endangered and designate critical habitat for 3 plant species. We proposed to

designate a total of 18,766 acres (ac) (7,597 hectares (ha)) on the island of Hawaii as critical habitat. Within that proposed rule, we announced a 60-day comment period, which began on October 17, 2012, and ended on December 17, 2012. Approximately 55 percent of the area being proposed as critical habitat is already designated as critical habitat for other species, including for the plant *Kokia drynarioides* (49 FR 47397, December 4, 1984), and 41 other listed plants (68 FR 39624, July 2, 2003), Blackburn's sphinx moth (68 FR 34710, June 10, 2003), and 3 picture-wing flies (73 FR 73794, December 4, 2003).

New Information

The anchialine pool shrimp *Vetericaris chaceorum* was recently documented at Manuka, Hawaii, approximately 15.5 mi (25 km) northwest of Luo o Palahemo, the previously only locality known for this species (77 FR 63928, October 17, 2012). The identification as *V. chaceorum* was confirmed by the Oxford Museum on Natural History and the Naturalis Biodiversity Center, Department of Marine Zoology, through the examination of two specimens collected by the Hawaii Department of Natural Resources, Division of Aquatic Resources (DAR) Hilo staff in 2012. Visual accounts made by DAR staff suggest that a population of *V. chaceorum* is established throughout the complex of pools located along the southern section of the Manuka Natural Area Reserve. Positive identifications of *V. chaceorum* were recorded in three pools; however, accurate estimates of its population are still unavailable due to the cryptic nature of this species.

The habitat in which *V. chaceorum* was found at Manuka is described as being considerably different than that of Lua o Palahemo, and was characterized by shallow (< 0.5 m deep) open pools dispersed throughout barren basaltic terrain. Accordingly, it does not seem to be limited to the deep recesses of the anchialine habitat (where the species was observed in Lua o Palahemo), but it may also roam freely throughout shallow exposed areas (Sakihara 2013, pers. comm).

The anchialine habitats in Manuka where *V. chaceorum* were recorded are located along the coastal boundary of the Manuka Natural Area Reserve (NAR), established in 1983 by the State of Hawaii. The Natural Area Reserves system is managed by the State of Hawaii, Department of Land and Natural Resources, Division of Forestry and Wildlife. Biological threats at Manuka have been described as including feral ungulates (goats) and an established population of alien invasive fountain grass (*Pennisetum setaceum*). NAR's management teams continue in their efforts in controlling biological threats to the natural resources within the NAR by active removal, monitoring, and public outreach (Sakihara 2013, pers. comm). The presence of and predation by introduced poeciliids (fish in the Poeciliidae family that bear live young) may represent a threat to the biological integrity of one of the anchialine pools at Manuka (Sakihara 2009, pp. 20, 28; Sakihara 2012, pp. 91–92), although they have not been documented in the pools inhabited by *V. chaceorum*. Anthropogenic (human-caused) disturbance associated with the presence of a jeep trail and campsites near the anchialine pools at Awili Point and Keawaiki may also represent a threat to the species (Sakihara 2012, p. 92).

Although this new information does not change our proposal to list this species as endangered or our finding that the designation of critical habitat is not determinable at this time, as discussed in the proposed rule (77 FR 63928, October 17, 2012), we will consider this new evidence of a second occurrence of *V. chaceorum* in analyzing the listing factors and making a final determination on whether this species should be listed. We request comments on whether this evidence should change the listing analysis contained in the proposed rule and, if so, how.

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency unless it is exempted pursuant to the provisions of the Act (16 U.S.C. 1536(e)-(n) and (p)). Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Consistent with the best scientific data available, the standards of the Act, and our regulations, we have initially identified, for public comment, a total of 18,766 ac (7,597 ha) in seven multi-species units located on the island of Hawaii that meet the definition of critical habitat for the three plant species. In addition, the Act provides the Secretary with the discretion to exclude certain areas from the final designation after taking into consideration economic impacts, impacts on national security, and any other relevant impacts of specifying any particular area as critical habitat.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded,

permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat. In the case of the three Hawaii Island plant species, the benefits of critical habitat include public awareness of the presence of one or more of these species and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the species due to protection from adverse modification or destruction of critical habitat. With regard to these species, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. We also consider the potential economic or social impacts that may result from the designation of critical habitat.

In the proposed rule, we identified several areas to consider excluding from the final rule. We are considering excluding from the final designation approximately 4,099 ac (1,659 ha) of private lands that have a voluntary conservation agreement, partners in watershed partnerships or dry forest working groups, conservation or watershed preserve designation, or similar conservation protection.

These specific exclusions will be considered on an individual basis or in any combination thereof. In addition, the final designation may not be limited to these exclusions, but may also consider other exclusions as a result of continuing analysis of relevant considerations (scientific, economic, and other relevant factors, as required by the Act), and the public comment process. In particular, we solicit comments from the public on whether all of the areas identified meet the definition of critical habitat, whether other areas would meet that definition, whether to make the specific exclusions we are considering, and whether there are other areas that are appropriate for exclusion.

The final decision on whether to exclude any area will be based on the best scientific data available at the time of the final designation, including information obtained during the comment periods and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**, above).

Draft Economic Analysis

The purpose of the draft economic analysis (DEA) is to identify and analyze the potential economic impacts associated with the proposed critical habitat designation for the three Hawaii Island plant species.

When a species is federally listed as endangered or threatened, it receives protection under the Act. For example, under section 7 of the Act, Federal agencies must consult with the Service to ensure that actions they fund, authorize, or carry out do not jeopardize the continued existence of the species. Economic impacts of conservation measures undertaken to avoid jeopardy to the species are considered baseline impacts in our analysis as they are not generated by the critical habitat designation. In other words, baseline conservation measures and associated economic impacts are not affected by decisions related to critical habitat designation for these species.

The DEA describes the economic impacts of potential conservation efforts for the three Hawaii Island plant species; some of these costs will likely be incurred regardless of whether we designate critical habitat. The economic impact of the proposed critical habitat designation is analyzed by comparing scenarios “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place for these species (e.g., under the Federal listing and other Federal, State, and local regulations). The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the three plant species. The incremental conservation efforts and associated impacts are those that would not be expected to occur without the designation of critical habitat for these species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat when

evaluating the benefits of excluding particular areas under section 4(b)(2) of the Act.

The “without critical habitat” scenario represents the baseline for the analysis, and considers the protections already afforded the three Hawaiian plants, regardless of critical habitat designation. The baseline for this analysis is the state of regulation, absent designation of critical habitat, which provides protection to these species under the Act, as well as any other Federal, State, and local laws and conservation plans. The baseline includes sections 7, 9, and 10 of the Act to the extent that they are expected to apply absent the designation of critical habitat for the species. The analysis qualitatively describes how baseline conservation for the three Hawaii Island plant species is currently implemented across the proposed designation in order to provide context for the incremental analysis (DEA Chapter 1.4 and Appendix B.3.1). For a further description of the methodology of the analysis, see DEA Chapter B.3.

The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed critical habitat designation for the three Hawaii Island plant species over the next 10 years, which was determined to be the appropriate period for analysis because limited planning information is available for most activities to forecast activity levels for projects beyond a 10-year timeframe. It identifies potential incremental costs as a result of the proposed critical habitat designation; these are the costs attributed to critical habitat over and above those baseline costs attributed to listing. The DEA separately identifies the potential incremental costs of the critical habitat designation on lands being

considered for exclusion under section 4(b)(2) of the Act.

The DEA focuses on economic activities that are occurring or have the potential to occur within the proposed critical habitat areas, and are of primary concern with respect to potential adverse modification of critical habitat. The key concern is the potential for activities to result in ground disturbance within a critical habitat unit. Such activities include commercial, residential, and industrial development, and transportation projects. Within these activity categories, the DEA is focused on those projects and activities that are considered reasonably likely to occur within the proposed critical habitat area. This includes projects or activities that are currently planned or proposed, or that permitting agencies or land managers indicate are likely to occur.

The only Federal regulatory effect of the designation of critical habitat is the prohibition on Federal agencies taking actions that are likely to destroy or adversely modify critical habitat. Federal agencies are not required to avoid or minimize effects unless the effects rise to the level of destruction or adverse modification as those terms are used in section 7 of the Act. Even then, the Service must recommend reasonable and prudent alternatives that: (1) Can be implemented consistent with the intended purpose of the action; (2) are within the scope of the Federal agency's legal authority and jurisdiction; and (3) are economically and technologically feasible. Thus, while the Service may recommend conservation measures, unless the action is likely to destroy or adversely modify critical habitat, implementation of recommended measures is voluntary,

and Federal agencies and applicants have discretion in how they carry out their section 7 mandates.

Thus, the direct, incremental impacts of critical habitat designation stem from the consideration of the potential for destruction or adverse modification of critical habitat during section 7 consultations. The two categories of direct, incremental impacts of critical habitat designation are: (1) The added administrative costs of conducting section 7 consultation related to critical habitat; and (2) implementation of any conservation efforts requested by the Service through section 7 consultation, or required by section 7 to prevent the destruction or adverse modification of critical habitat.

The DEA describes the types of project modifications currently recommended by the Service to avoid jeopardy to the two currently listed species, *Isodendron pyrifolium* (listed as an endangered species on March 4, 1994 (59 FR 10305)), and *Mezoneuron kawaiense* (listed as an endangered species on July 8, 1986 (51 FR 24672)) (“baseline” project modifications). Critical habitat is also proposed for *Bidens micrantha* ssp. *ctenophylla*, which was proposed for listing as endangered on October 17, 2012 (77 FR 63928) and co-occurs with the above two species. These baseline project modifications would be recommended in occupied habitat areas regardless of whether critical habitat is designated for the two currently listed species, and would also be recommended for *Bidens micrantha* ssp. *ctenophylla*, regardless of critical habitat designation, should it be listed under the Act. Although the standards for jeopardy and adverse modification of

critical habitat are not the same, because the degradation or loss of habitat is a key threat to the three Hawaii Island plant species, a jeopardy analyses for these species would already consider the potential for project modifications to avoid the destruction of habitat; therefore recommendations to avoid jeopardy would also likely avoid adverse modification or destruction of critical habitat for these species.

The Service estimates that the only project modification that may be recommended to avoid adverse modification of critical habitat above and beyond that recommended to avoid jeopardy to the species would be in cases where permanent impacts to critical habitat are unavoidable; in such cases, the Service would recommend that habitat loss be offset elsewhere in designated critical habitat, preferably within the critical habitat unit where the loss occurred. In other words, while the Service may recommend that habitat loss be offset even absent critical habitat designation, critical habitat designation may generate the additional recommendation that the offset occur within the critical habitat unit. In occupied critical habitat, therefore, the incremental impacts are most likely limited to the potential incremental cost of offsetting habitat loss within the critical habitat unit that is affected as opposed to outside of the unit. As noted above, any recommended offsets would not be required unless necessary to avoid violating the prohibition of section 7 (i.e., destroying or adversely modifying critical habitat). However, to be conservative regarding potential incremental costs of the proposed critical habitat designation, the DEA assumes that the Federal agency or applicant may choose to implement the recommended offsets.

With regard to occupied habitat, the DEA predicts that a recommendation that ground disturbance be offset within the critical habitat unit would not generate additional economic impacts, beyond those related to the listing of the species under the Act. It is therefore unlikely that critical habitat designation would change the outcome of a future section 7 consultation on projects or activities within occupied areas, and incremental impacts would most likely be limited to the additional administrative effort of considering adverse modification as part of the consultation. However, the effects of each project on critical habitat would need to be evaluated as appropriate once a final decision has been made on this designation.

The proposed critical habitat designation includes seven multi-species units, totaling 18,766 acres (7,597 hectares) within Hawaii's lowland dry ecosystem. Each unit is occupied by at least one of the three species for which critical habitat is proposed, although the three plants do not necessarily occur across the entirety of each unit. Individuals of these species may be scattered intermittently throughout a unit or clumped in portions of a unit. While we have proposed areas that may be unoccupied on the basis that they are essential to the conservation of the species, for example in order to provide room for population expansion, there may be portions of each unit that would not be subject to section 7 consultation because the species does not occur in the specific location being impacted by a proposed action. Therefore, ground surveys to locate the individual plants would need to be conducted prior to each proposed project or activity

within critical habitat and the cost of the consultation and any resulting conservation actions may be attributable to critical habitat.

The designation of critical habitat may, under certain circumstances, affect actions that do not have a Federal nexus and thus are not subject to the provisions of section 7 under the Act. Indirect impacts are those unintended changes in economic behavior that may occur outside of the Act, through other Federal, State, or local actions, and that are caused by the designation of critical habitat. Chapter 2.6 of the DEA discusses the types of potential indirect impacts that may be associated with the designation of critical habitat, such as time delays, regulatory uncertainty, and negative perceptions related to critical habitat designation on private property. These types of impacts are not always considered incremental. In the case that these types of conservation efforts and economic effects are expected to occur regardless of critical habitat designation, they are appropriately considered baseline impacts in this analysis.

Critical habitat may generate incremental economic impacts through implementation of additional conservation measures (beyond those recommended in the baseline) and additional administrative effort in section 7 consultation to ensure that projects or activities do not result in adverse modification of critical habitat. However, as described above and in Chapter 1 of the DEA, where critical habitat is considered occupied by the three Hawaii Island plant species, critical habitat designation is expected to have a more limited effect on economic activities, since section 7 consultation would

already occur due to the presence of the species and these additional conservation measures would already be considered.

The focus of the DEA is on projects that are occurring or are reasonably likely to occur, based on information received from the development community in response to the proposed rule (77 FR 63928, October 17, 2012). Based on our section 7 consultation history, it is unlikely that critical habitat designation would change the outcome of a future section 7 consultation on projects or activities within occupied areas of the proposed designation. However, within unoccupied areas, all costs associated with conservation efforts recommended in section 7 consultations (including administrative costs) would be direct incremental costs attributable to proposed designation. Within areas proposed for critical habitat designation, the DEA estimates a total present value impact of \$35,000 over the next 10 years (an annualized impact of \$4,700, with a 7 percent discount rate) associated with future section 7 consultations (DEA, Exhibit 2-1). Impacts on projects occurring in areas being considered for exclusion under section 4(b)(2) of the Act are expected to be \$15,000 (an annualized impact of \$2,000, with a 7 percent discount rate). These costs reflect administrative effort of considering critical habitat in future section 7 consultations on projects identified as occurring within the proposed critical habitat area. Specifically, the DEA forecasts five future section 7 consultations for projects located in areas overlapping proposed critical habitat Units 33, 34, and 35, and three future consultations for projects located in areas being considered for exclusion in proposed critical habitat units 33, 34, and 35. The DEA assumes that all

of the consultations would occur in 2013, following the designation of critical habitat.

Since projects and activities occurring within occupied habitat areas are less likely to be directly affected (i.e., economic impacts would most likely be limited to administrative costs), the DEA primarily focuses on the two reasonably foreseeable projects of which we are aware, that would occur within unoccupied areas of the proposed designation. These projects include a Department of Hawaiian Homelands (DHHL) residential project within proposed critical habitat unit 33, and a Queen Liliuokalani Trust (QLT) mixed-use development project within proposed critical habitat unit 35.

The DEA concludes that additional direct and indirect impacts of the designation are possible, although information limitations preclude quantification in this analysis. The DHHL project on 91 acres (37 hectares) of an unoccupied area of proposed critical habitat unit 33 is likely to be subject to section 7 consultation. However, significant uncertainty exists regarding the extent of conservation efforts that DHHL would ultimately undertake to avoid adverse modification of critical habitat. The QLT project overlaps 302 unoccupied acres (122 hectares) in proposed critical habitat Unit 35, and while a Federal nexus compelling consultation is unlikely, the project may be subject to indirect impacts including additional management by the county associated with required zoning changes. However, the uncertainties described in the DEA include whether the critical habitat designation will generate indirect economic impacts, including changes in

land management by the State or county. Additionally, while the DEA describes the Service's initial recommendations, the projects would be reviewed on a case-by-case basis during the consultation process. The ultimate nature and extent of conservation efforts is therefore uncertain.

We are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if the Secretary determines the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of the species.

Required Determinations—Amended

In our October 17, 2012, proposed rule (77 FR 63928), we indicated that we would defer our determination of compliance with several statutes and executive orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the draft economic analysis. We have now made use of the draft economic analysis data to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O.

13132 (Federalism), E.O. 12988 (Civil Justice Reform), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), and the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*). However, based on the draft economic analysis data, we are amending our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), E.O. 13211 (Energy, Supply, Distribution, and Use), and E.O. 12630 (Takings). We are also providing a determination for the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951), which we inadvertently omitted from the October 17, 2012, proposed rule (77 FR 63928). In light of the statutory requirement that listing decisions be made “solely” on the basis of the best scientific and commercial data available, the following determinations relate only to the proposed critical habitat rulemaking, not the proposed listing rule.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no

regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Based on our draft economic analysis of the proposed designation, we are certifying that the critical habitat designation for the three Hawaii Island plant species, if adopted as proposed, will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term

“significant economic impact” is meant to apply to a typical small business firm’s business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities, such as: (1) Agricultural, commercial, and residential development; (2) transportation; and (3) livestock grazing and other human activities. We apply the “substantial number” test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define “substantial number” or “significant economic impact.” Consequently, to assess whether a “substantial number” of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only has regulatory effects on activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and will not be affected by critical habitat designation. In areas where any of the three Hawaii Island plant species are present, Federal agencies are already required to consult with us under section 7 of the Act on activities they authorize,

fund, or carry out that may affect the species. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see “Application of the Adverse Modification Standard” section of the proposed rule (October 17, 2012, 77 FR 63928)).

The Service’s current understanding of recent case law is that Federal agencies are only required to evaluate the potential impacts of rulemaking on those entities directly regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an endangered or threatened species only has a regulatory effect where a Federal action agency is involved in a particular action that may affect the designated critical habitat. Under these circumstances, only the Federal action agency is directly regulated by the designation, and, therefore, consistent with the Service’s current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders 12866 and 13563 direct Federal agencies to assess costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by

the RFA. In other words, while the effects analysis required under the RFA is limited to entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the E.O. regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable. In doing so, we focus on the specific areas proposed to be designated as critical habitat and compare the number of small business entities potentially affected in that area with other small business entities in the region, instead of comparing the entities in the proposed area of designation with entities nationally, which is more commonly done. This analysis results in an estimation of a higher number of small businesses potentially affected.

As identified in Exhibit A-1, the third parties for five of the eight projects identified in the analysis are not considered small businesses. As it is unknown whether or not the third parties associated with the remaining three projects are small businesses, we conservatively assume that they are small businesses for purposes of our analysis. The per-consultation third-party cost of participating in a formal consultation is estimated to be \$900, as described in Appendix B, Exhibit B-1. Exhibit A-2 provides information on the average annual revenues of small entities in the development industry, calculated using Risk Management Association (RMA) data. As detailed in the exhibit, the per-entity cost to participate in a single consultation likely represents approximately 0.01 percent or less of annual revenues. Note that the average annual revenues reported in Exhibit A-2 are derived from nationwide data, as there is limited data available to assess revenues of these types of businesses in Hawaii County, and therefore the revenues of

these particular third parties may be far less. However, the estimated per-consultation cost of \$900 is not likely to represent a significant portion of revenues for each third party. Therefore, we conclude that the economic impacts are not significant.

Following our evaluation of potential effects to small business entities from the proposed rulemaking, we conclude that the number of potentially affected small businesses is not substantial, and that the economic impacts are not significant. In the draft economic analysis, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed designation of critical habitat for the three Hawaii Island plant species. Quantified incremental impacts that may be borne by small entities are limited to the administrative costs of section 7 consultation related to development and transportation projects (DEA, Appendix A-4). For projects located in occupied areas of the proposed critical habitat designation, incremental impacts of the designation are likely limited to these administrative costs for participation in the consultations. For projects located in unoccupied areas of the proposed critical habitat designation, incremental impacts may also include costs associated with additional conservation efforts implemented as a result of section 7 consultation.

The proposed critical habitat is located in the South Kohala and North Kona districts of the Big Island. The Hawaii County General Plan, approved in 2005 by the County Council, identifies both districts as the major tourism centers on the island, and

describes Kona as “the center for government, commercial, and industrial activities for West Hawaii.” The plan outlines a proposed land use pattern, known as the Land Use Pattern Allocation Guide, which identifies much of the proposed critical habitat area for “urban expansion,” where “new settlements may be desirable, but where the specific settlement pattern and mix of uses have not yet been determined.” In addition to the General Plan, which serves as the overall planning document for the county, Hawaii County also has Community Development Plans that translate the broader goals of the General Plan into specific implementation actions for geographic regions around the island. The Kona Community Development Plan (KCDP), adopted as Ordinance 08-131 in September 2008, identifies much of the area proposed for critical habitat designation as within the Kona Urban Area. Specifically, the entirety of proposed critical habitat Units 34, 35, and 36, and the majority of Unit 33, fall within the Kona Urban Area, as shown in Exhibit 2-2. One of the main goals of the KCDP is to direct future growth to the Kona Urban Area, and specifically to “compact villages located along proposed transit routes or to infill areas within, or adjacent to, existing development,” several of which overlap with the proposed critical habitat area.

Of the projects we identified within areas proposed for critical habitat designation, only two are expected to occur on lands that are unoccupied by the species, and could experience the greatest economic impact related to the proposed critical habitat designation. A Department of Hawaiian Home Lands (DHHL) residential project is planned within proposed critical habitat Unit 33, and a development project is planned

within critical habitat Unit 35 by the Queen Lili`uokalani Trust (QLT) (DEA, Chapter 2). The DHHL is a State governmental agency, and the QLT Statements of Financial Position dated December 31, 2011, and 2010 identifies current assets of \$193,590,994 and \$197,834,747, and liabilities of \$4,137,037 and \$2,518,920 respectively (QLT 2011). Accordingly, neither of these entities would be considered small businesses under the RFA, as amended by the SBREFA. Therefore, we conclude that the economic impacts are not significant. Following our evaluation of potential effects to small business entities from the proposed rulemaking, we conclude that the number of potentially affected small businesses is not substantial, and that the economic impacts are not significant.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute “a significant adverse effect” when compared to not taking the regulatory action under consideration. As described in the Chapter 1 of the DEA, the designation of critical habitat for the plants is not anticipated to result in any impacts to the energy industry. As such, the designation of critical habitat is not expected to significantly affect energy

supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

E.O. 12630 (Takings)

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for *Bidens micrantha* ssp. *ctenophylla*, *Isodendron pyrifolium*, and *Caesalpinia kawaiense* (taxonomic revision proposed to *Mezoneuron kawaiense*) in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding, assistance, or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. The economic analysis found that no significant economic impacts are likely to result from the designation of critical habitat for the above three species. Because the Act's critical habitat protection requirements apply only to Federal agency actions, few conflicts between critical habitat and private property rights should result from this designation. Based on information contained in the economic analysis assessment and described within this document, it is not likely that economic impacts to a property owner would be of a sufficient magnitude to support a takings action. Therefore, the takings implications assessment concludes that this designation of

critical habitat for *Bidens micrantha* ssp. *ctenophylla*, *Isodendrion pyrifolium*, and *Caesalpinia kawaiense* (taxonomic revision proposed to *Mezoneuron kawaiense*) does not pose significant takings implications for lands within or affected by the designation.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of Interior's manual at 512 DM2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

We have determined that there are no tribal lands occupied at the time of listing that contain the features essential for the conservation, and no tribal lands that are essential for the conservation, of the three Hawaii Island plant species. Therefore, we have not proposed designation of critical habitat for any of the three Hawaii Island plant species on tribal lands.

Authors

The primary authors of this notice are the staff members of the Pacific Islands Fish and Wildlife Office, Pacific Region, U.S. Fish and Wildlife Service.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Date: April 22, 2013

Rachel Jacobson

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4310-55

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